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IN THE

Supreme Court of the United States

October Term, 1955

No. 463

CAPITAL TRANSIT COMPANY, *Petitioner*

v.

GEORGE SPIEGEL

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CAPITAL TRANSIT COMPANY, *Petitioner*

v.

GEORGE SPIEGEL

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Capital Transit Company ("Transit") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

ORDERS AND OPINIONS BELOW

The order of the Public Utilities Commission of the District of Columbia (R. 2-42) is unreported. The District Court's opinion (R. 72-92) is reported at 125 F. Supp. 453, *sub nomine Allied Civic Group, Inc.* v. *Public Utilities Commission of the District of Colum-*

bia. The opinion of the Court of Appeals (Appendix A, *infra,* pp. 1a-8a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra,* p. 9a) was entered on July 8, 1955. On July 23, 1955, petitioner applied for rehearing in banc. The Court of Appeals, acting in banc, denied the petition for rehearing on September 9, 1955, with Circuit Judges Miller and Fahy voting to grant and Circuit Judge Prettyman not participating (Appendix C, *infra,* p. 10a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Section 43-705, D. C. Code (1951).

QUESTIONS PRESENTED

The Public Utilities Commission of the District of Columbia ("Commission"), acting under the "just and reasonable" standard of rate making provided by its governing statutes, established rates for Transit on the basis of an original cost rate base. In the course of its order, the Commission discussed certain trends in the transit industry that might, if continued or accentuated, require it to use a lower-valued "economic" rate base in determining Transit's rates in the future. On an appeal brought by a ratepayer, the Court of Appeals, without determining whether the rates established by the Commission were just and reasonable to the ratepayer, held the Commission's order defective for not adequately explaining why it used an original cost rate base instead of an "economic" rate base. The questions presented are:

1. May a court, on review brought by a ratepayer, hold defective a rate order established under the "just

and reasonable" standard of rate making for an infirmity in a commission's rate base determination without deciding whether the rates established by the commission were just and reasonable in end result to the ratepayer?

2. Did the Commission set forth in its order adequate findings and reasons in support of its determination to use an original cost rate base in this proceeding?

STATUTES INVOLVED

D. C. Code (1951):

Section 43-401.

> . . .[A]ny public utility desiring to advance or discontinue any such rate or rates may make application to the commission in writing, stating the advance in or discontinuance of the rate or rates desired, giving the reasons for such advance or discontinuance; . . . upon receiving such application the commission shall fix a time and place for hearing, and give such notice to interested parties as shall be proper and reasonable; if, after such hearing and investigation, the commission shall find that the change or discontinuance applied for is reasonable, fair, and just, it shall grant the application, either in whole or in part . . . (Mar. 4, 1913, 37 Stat. 994, ch. 150, § 8, par. 94.)

Section 43-411.

> If upon such investigation the rates, tolls, charges, schedules, or joint rates shall be found to be unjust, unreasonable, insufficient, or unjustly discriminatory, or to be preferential or otherwise in violation of any of the provisions of chapters 1-10 of this title, the commission shall have power to determine and by order fix and order to be substituted therefor such rate or rates, tolls, charges,

or schedules as shall be just and reasonable . . . (Mar. 4, 1913, 37 Stat. 983, ch. 150, § 8, par. 41.)

Section 43-706.

In the determination of any appeal from an order or decision of the Commission the review by the court shall be limited to questions of law, including constitutional questions; and the findings of fact by the Commission shall be conclusive unless it shall appear that such findings of the Commission are unreasonable, arbitrary, or capricious. (Mar. 4, 1913, 37 Stat. 989, ch. 150, § 8, par. 66; Aug. 27, 1935, 49 Stat. 883, ch. 742, § 2.)

STATEMENT

Proceedings Before Commission

On April 3, 1953, Transit applied to the Commission for an increase in the fares charged for the transportation of passengers within the District of Columbia. The fares in effect at that time were:

Cash fare	—	17¢
Token fare	—	5 for 75¢
Weekly pass	—	$2.40
School fare	—	3¢

Transit's application proposed:

Cash fare	—	20¢
Token fare	—	5 for 95¢
School fare	—	3¢ (R. 2)

Hearings on the proposed fare increase were commenced on June 3, 1953, and were continued through 26 sessions until their conclusion on October 1, 1953. A total of 73 exhibits were offered in evidence, and 3,242 pages of testimony were taken. (*Id.*)

The Commission granted George Spiegel, certain Maryland associations, and other Maryland resi-

dents,, a limited intervention in the proceeding. Mr. Spiegel conducted cross examination of several witnesses, but neither he nor the other interveners represented by him offered any direct evidence or testimony. (R. 2, 17.)

Following the submission of briefs by the parties, the Commission, on January 20, 1954, issued its Order No. 4052 (R. 2-42). In this order, which contains 41 pages, the Commission, after thoroughly canvassing all the issues raised before it, authorized Transit to put the following increased fares into effect on January 31, 1954:

Cash fare	—	20¢
Token fare	—	5 for 80¢
Weekly permit	—	75¢ plus 10¢ per ride
School fare	—	3¢ (R. 42)[1]

In Order No. 4052, the Commission started from the premise that it had the duty to establish fares that struck a just and reasonable balance between the interests of Transit and the public (Passages A and B, *infra*, pp. 11a-12a).[2] It went on to find, from the record before it, that Transit's original cost rate base of $23,420,691, as established by the testimony and exhibit of the Commission's own expert witness, should be used in fixing Transit's rates (Passage C, *infra*, pp. 12a-13a). The Commission then, after discussing the downward economic trends in the transit industry in

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[1] These rates were superseded on August 21, 1955, by rates established under Public Law 389, 84th Cong., 1st Sess., by the Commissioners of the District of Columbia upon the recommendation of the Public Utilities Commission.

[2] The passages of Order No. 4052 upon which this summary is based are set forth in Appendix D, *infra*, pp. 11a-15a.

general and in Transit's own business (Passages B and D, *infra,* pp. 11a-12a, 13a), warned that a continuation or accentuation of these trends might require the Commission in the future to use an "economic"[3] rate base in order to arrive at fares that were just and reasonable to farepayers (Passages D and E, *infra,* pp. 13a-14a). The Commission clearly concluded, however, that it was not necessary in the proceeding before it to depart from an original cost rate base in order to reach a just and reasonable result (Passages D, E, and F, *infra,* pp. 13a-14a). But it did find that it should take the downward trends that it had discussed into consideration in determining the rate of return that it found Transit entitled to (Passages F and H, *infra,* p. 14a). On this point, the Commission found that these downward trends required it to give Transit a lower rate of return (6.32%) than it otherwise would have been entitled to under the prudent investment theory of rate making (Passages H and J, *infra,* pp. 14a, 15a). Finally, the Commission found that the increased fares established by it in Order No. 4052 were "not unreasonably high" (Passage J, *infra,* p. 15a) and that "they were reasonable, just and non-discriminatory, and in the public interest" (Passage K, *infra,* p. 15a).

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[3] An "economic" rate base, as that term has been used in this proceeding, is a rate base lower than an "original cost" rate base. Implicit in this term is the thought that the current value of a utility's property is less than the prudently invested original cost of that property less accrued depreciation. Thus an "economic" rate base is no more than the converse of a "fair value" rate base, the phrase used to describe a rate base higher than an original cost rate base because predicated on current costs that are higher than the actual, original cost of the rate base property.

Appeal to the District Court

Mr. Spiegel, on behalf of himself and the interveners represented by him, filed, pursuant to the provisions of Section 43-705, D. C. Code (1951), a petition of appeal in the United States District Court for the District of Columbia. The Commission answered, and Transit was permitted to intervene. (R. 43-58, 59-61, 62.)

In his petition of appeal, Mr. Spiegel alleged, among other things, that the Commission's rate base determination was invalid in that the Commission did not state sufficient reasons for rejecting an economic rate base and using an original cost rate base (R. 47-48). The District Court (Keech, D. J.), which had before it the record of the proceedings before the Commission, filed an opinion on October 19, 1954, in which it held:

> " . . . that the rate base method used by the Commission and the rate base figure found by the Commission were fair and reasonable; that the findings essential to the rate-making process were made and supported by substantial evidence; that there was no error of law justifying reversal of the Commission's order under the governing statute as interpreted by the courts; and that there was no proof that the rates fixed are unfair, arbitrary, or capricious. The court therefore holds that the appeal must be dismissed and the order affirmed" (R. 92).

Appeal to the Court of Appeals

Mr. Spiegel then appealed to the Court of Appeals on his own behalf alone. He did not bring up as part of the record on appeal the record of the proceedings before the Commission, and, accordingly, the Court

of Appeals did not have before it the administrative record on which Order No. 4052 was based. (R. 95-96.) The appeal was defended by the Commission and Transit (Appendix A, *infra*, p. 1a).

The Court of Appeals reversed the judgment of the District Court and held Order No. 4052 defective on the ground that the Commission had not set forth reasons adequate to explain why it used an original cost rate base in preference to an "economic" rate base in establishing rates for Transit (Appendix A, *infra*, pp. 1a-8a).

At the outset of its discussion of the validity of the Commission's rate base determination, the Court of Appeals (Circuit Judges Washington, Danaher, and Bastian) stated:

> "The importance of the ... question presented needs no underscoring. The choice of a proper rate base is, of course, vital to the setting up of a sound and workable fare structure ..." (Appendix A, *infra*, p. 2a.)

The court next quoted certain portions of the Commission's order dealing with its rate base determination (see Passage B, *infra*, pp. 11a-12a), and went on to state:

> "The findings and conclusions we have quoted could well, we think, have supported a conclusion by the Commission that the rate base should be set at a level reflecting the current value of the company's properties, viewed realistically. *Market Street Railway Co.* v. *Railroad Commission*, 324 U.S. 548 (1945). But the Commission did not then adopt such a rate base. Instead of following its quoted findings to what would appear to be their logical conclusion, the Commission reached

a different conclusion. As we have seen, it arrived at a rate base in the amount of $23,420,691, representing the company's original property investment, as weighted and adjusted by the Commission. And the Commission's reasons for using the original cost rate base do not clearly appear from its opinion and order. This gives us our present concern, not because we mean to intimate which base should predicate Commission action, but because we cannot properly exercise our appellate function unless the Commission states the reasons for the course it decided to follow. The fact, of course, that the original cost rate base had been used on previous occasions is not a sufficient reason, without more, for continuing its use . . ." (Appendix A, *infra,* pp. 5a-6a.)

* * * * * * * *

"We are not here expressing a judgment as to what rate base the Commission should have adopted. That is not our function; we could not substitute our own view on such a question—if we had reached a view—for that of the Commission. *Federal Power Commission* v. *Colorado Interstate Gas Co.,* 348 U.S. 492 (1955). Nor are we saying that the Commission may not ultimately be able to justify its adoption of the original cost rate base, if it decides to adhere to that course. But we do say that the decision of the Commission must be based on a 'suitably complete statement' of its reasons for its conclusions. *Florida* v. *United States,* 282 U.S. 194, 215 (1931), citing *Beaumont, S. L. & W. Ry.* v. *United States,* 282 U.S. 74, 86 (1930) . . . " (Appendix A, *infra,* pp. 7a-8a.)

The Court of Appeals did not discuss in its opinion whether the rates established by the Commission were just and reasonable in their end results to the ratepayer.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has erroneously determined two questions of importance in the administration of rate-making statutes enacted by Congress. In holding the Commission's order defective for an infirmity in its rate base determination, without considering whether the end result of the order was "just and reasonable," the decision of the Court of Appeals is in conflict with this Court's decision in *Power Comm'n* v. *Hope Gas Co.*, 320 U.S. 591. And the determination of the Court of Appeals that the Commission failed to state adequate reasons in support of its rate base determination conflicts with the decisions of this Court in *United States* v. *Pierce Auto Lines*, 327 U.S. 515, and *B & O. R. Co.* v. *United States*, 298 U.S. 349, 359, and kindred cases. The importance of the questions presented is not limited to the District of Columbia statutes upon which they arise. The Court of Appeals of the District of Columbia also has jurisdiction to review rate orders issued by the Federal Power Commission under federal statutes providing for the "just and reasonable" standard of rate making. The thrust of the questions presented reaches these statutes as well as the District of Columbia statutes directly involved in this proceeding.

1. In Sections 43-401 and 43-411, D. C. Code (1951), Congress gave the Public Utilities Commission of the District of Columbia authority to establish "just and reasonable" rates for utilities operating in the District of Columbia. Acting under this standard, the Commission, in its Order No. 4052, adopted an original cost rate base in establishing rates for Transit. On appeal by a farepayer, the Court of Appeals ruled that:

> "The choice of a proper rate base is, of course, *vital* to the setting up of a sound and workable

> fare structure." (Appendix A, *infra*, p. 2a; emphasis supplied.)

Consistently with this view, the Court of Appeals, having found what it deemed an infirmity in the Commission's rate base determination, held Order No. 4052 defective without considering whether the rates established by the Commission therein were just and reasonable to the farepayer in their end result.

In Section 5(a) of the Natural Gas Act, 52 Stat. 823, 15 U.S.C. 717d, Congress gave the Federal Power Commission authority to establish "just and reasonable" rates for persons engaged in the transportation of natural gas in interstate commerce. Acting under this "just and reasonable" standard of rate making, the Federal Power Commission adopted an original cost rate base in establishing rates for the Hope Natural Gas Company. On a petition to review brought by the Company, the Fourth Circuit held the Commission's rate order invalid on the ground that there was an infirmity in the Commission's rate base determination. *Hope Natural Gas Co.* v. *Federal Power Commission*, 134 F. 2d 287.

This Court, in *Power Comm'n* v. *Hope Gas Co.*, 320 U.S. 591, reversed the Fourth Circuit, saying (320 U.S. at p. 602, 603):

> " . . . Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling . . . It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important.

> " . . . The conditions under which more or less might be allowed are not important here. Nor is it important to this case to determine the various permissible ways in which any rate base on which the return is computed might be arrived at. For we are of the view that the end result in this case cannot be condemned under the Act as unjust and unreasonable from the investor or company viewpoint."

The decision of the Court of Appeals in the instant case clearly conflicts with the decision of this Court in the *Hope* case. In that case, this Court held that an infirmity in a rate base determination could not be sufficient grounds to overturn a rate order if the end result of the order was just and reasonable.[4] The rule of the *Hope* case clearly requires federal courts reviewing rate orders based on the "just and reasonable" standard of rate making to predicate their decisions on the end results of the rates established in the orders and not on the validity of the methods used by commissions in reaching those rates. Despite this, the Court of Appeals in the instant case, without even so much as considering whether the rates established therein were just and reasonable in their end results, held Order No. 4052 defective on the sole ground that there was a supposed infirmity in the Commission's rate base determination. Obviously, the departure of the Court of Appeals from the rule of the *Hope* case

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[4] See also the concurring opinion of Black, Douglas, and Murphy, JJ., in *Power Comm'n* v. *Pipeline Co.*, 315 U.S. 575, where it was stated that under the "just and reasonable" standard of rate making:

> ". . . we do not think it is permissible for the courts to concern themselves with any issues as to the economic merits of a rate base." (315 U.S. 575, 606.)

cannot be supported on the grounds that an infirmity in the Commission's rate base determination made it impossible for the court to decide if the end results of Order No. 4052 were just and reasonable. For this Court, in the *Hope* case, demonstrated that the justness and reasonableness of the end results of a rate order can be judicially determined without reference to the validity or invalidity of the underlying rate base determination.

The conflict between the two decisions is not merely a technical one having no practical significance in the field of utility rate regulation. It is a conflict in policy that has an immediate, important, and fundamental effect in that field. Rate base determination is a highly technical and complex matter both as to underlying theory and as to matter of proof. If, as a matter of judicial policy, infirmities in a commission's rate base determination—either as to the proper statement of theory or as to a precise and mathematical statement of the computations leading to the exact dollar amount of a rate base—were permitted to be the fulcrum for overturning rate orders, there would be an open and continuing invitation to both utilities and ratepayers to pursue appeals in the hope of proving error somewhere in the morass of the technicalities of rate base determination. In such a case, rate orders could be put in jeopardy even though the persons seeking review could not demonstrate that the end result of the order caused harm to them. This Court, in the *Hope* case, announced a judicial rule of jeofails to prevent just such a stultification of the rate making process. The policy underlying the rule is clear. Rate orders, involving, as they do, the public interest, should not be overturned on judicial review for technical error, but

only upon a showing by the party seeking review that the end result of the order substantially harms him.[5] This policy, by its very nature, applies whether the review is sought by a ratepayer or by a utility.

The fact that the decision of the Court of Appeals was rendered on review of a rate order issued under a statute enacted by Congress for the District of Columbia does not diminish the importance of the question raised by that court's decision in this case. The Court of Appeals has recognized that the "just and reasonable" standard of rate making set forth in the District of Columbia statutes is the same standard in all material respects as that enacted by Congress in the Natural Gas Act for the guidance of the Federal Power Commission in establishing rates for the transportation of gas in interstate commerce. *Washington Gas Light Co.* v. *Baker,* 88 U.S. App. D.C. 115, 188 F.2d 11, 14, certiorari denied 340 U.S. 952. Moreover, the Court of Appeals has jurisdiction to review rate orders of the Federal Power Commission.[6] Therefore, the instant case, if unreversed, stands as precedent for the Court of Appeals to follow not only on future reviews of rate orders of the Public Utilities Commission of the District of Columbia but also on future reviews of rate orders of the Federal Power Commission.

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[5] The District Court in its opinion (R. 74) said:

"Counsel for petitioners [Mr. Spiegel] has conceded that he is without information which would enable him to conclude what rates would have been fixed had the order included the essential findings which he contends were omitted . . ."

[6] Section 19, Natural Gas Act, 52 Stat. 831, 15 U.S.C. 717d; Section 313, Federal Power Act, 49 Stat. 860, 16 U.S.C. 825l.

The decision of the Court of Appeals should, it is submitted, be reviewed and reversed because of its conflict with this Court's decision in the *Hope* case.

2. Since Mr. Spiegel did not bring up the administrative record upon which Order No. 4052 was based, the Court of Appeals was required, of course, to assume that every basic and ultimate finding the Commission made in reaching its rate base determination was supported by substantial evidence of record. *Mississippi Valley Barge Line Co.* v. *United States,* 292 U.S. 282, 286; *Lubetich* v. *United States,* 315 U.S. 57, 58. Moreover, the District Court after reviewing the administrative record, specifically found that the Commission's rate base determination was supported by substantial evidence (R. 92). It is accordingly clear that the only question that can be raised concerning the sufficiency of the Commission's rate base determination is whether the underlying findings are adequate in form and substance.

So far as substance is concerned, the starting point, direction, and final destination of the path travelled by the Commission in its rate base determination can be clearly discerned from the pertinent passages of Order No. 4052 (Appendix D, *infra,* pp. 11a-15a). The starting point was the evidence in the record before it (Passage A, *infra,* p. 11a). The direction was determined by the choice of rate base that would result in fares that were just and reasonable to Transit and to the public (Passages B and D, *infra,* pp. 11a-12a, 13a). The determination of that choice involved a conscious and deliberate consideration by the Commission of the problem whether it was necessary to use an economic rate base in order to arrive at fares that were just and reasonable to the public (*Id.*). It rejected an eco-

nomic rate base because it found, in view of current conditions shown by the record before it, that an original cost rate base used in conjunction with a low rate of return would result in fares that were just and reasonable to both the public and Transit (Passages C, D, E, F, J and K, *infra,* pp. 12a-15a). It was for these reasons of substance, plainly appearing from the language of Order No. 4052, that the Commission decided to use an original cost rate base.

So far as form is concerned, the structure of the Commission's basic findings in Order No. 4052 is certainly as sufficient to withstand judicial review as the following basic finding of the Interstate Commerce Commission on a motor carrier's fitness that this Court approved in *United States* v. *Pierce Auto Lines,* 327 U.S. 515, 533:

> "Fitness.—There is no doubt as to O.N.C.'s fitness, financial or otherwise, to conduct the operations herein authorized, although protestants questioned Consolidated's financial ability to conduct the proposed operation. Protestants contend that if these applications are granted each applicant will operate at a loss. Each applicant of course claims that it will be better off if allowed to operate straight through without the necessity of interchanging at Medford. Elimination of the cost of transfer at Medford would save approximately fifteen or sixteen hundred dollars a month. Considering the fact heretofore discussed in some detail, we are of the opinion that we should give applicants the benefit of any doubts that may exist as to whether they could operate successfully over the routes authorized herein."

And just as certainly, the Commission's ultimate findings in Order No. 4052 are as sufficient to withstand judicial review as the following ultimate finding of

the Interstate Commerce Commission on discrimination against interstate commerce that this Court approved in *King* v. *United States,* 344 U.S. 254, 268:

> "7. That the maintenance of *intrastate rates* and charges *within Florida on bases lower than those herein approved causes, and in the future will cause, (1) in all instances, unjust discrimination against interstate commerce,* (2) in nearly all instances, undue preference of and advantage to localities in intrastate commerce, and undue prejudice to localities in interstate commerce; ..." (Italics supplied by this Court.)

In deciding to require of the Commission a more explicit and elaborate statement of the reasons for its determination to adopt an original cost rate base in this proceeding, the Court of Appeals has overstepped the proper province of a court in reviewing an administrative order. The necessary consequence of its decision is to require the Commission to annotate its findings with the evidence, to state the weight it gave a particular item of evidence, to disclose the mental operations by which it reached its decision, and to demonstrate the wisdom of its determination to the satisfaction of the reviewing court. This is contrary to express holdings of this Court in such decisions as *B. & O. R. Co.* v. *United States,* 298 U.S. 349, 359; *Virginian Railway* v. *United States,* 272 U.S. 658, 665-666; *U. S.* v. *Pierce Auto Lines,* 327 U.S. 515, 529; *Radio Corp.* v. *United States,* 341 U.S. 412, 420.

The Court should review and reverse the decision of the Court of Appeals in this case in order to maintain the proper balance between the functions of courts and commissions in the administrative process.

CONCLUSION

For the foregoing reasons it is submitted that this Court should grant this petition for a writ of certiorari, review the proceeding below, and reverse the judgment of the Court of Appeals.

Respectfully submitted,

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October 13, 1955

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12523

GEORGE SPIEGEL, APPELLANT,

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA AND CAPITAL TRANSIT COMPANY, APPELLEES.

Appeal from the United States District Court
for the District of Columbia

Decided July 8, 1955

Mr. George Spiegel, appellant *pro se.*

Mr. Lloyd B. Harrison, Special Assistant Corporation Counsel for the District of Columbia, with whom *Messrs. Vernon E. West,* Corporation Counsel, and *J. Hampton Baumgartner, Jr.,* Assistant Corporation Counsel, were on the brief, for appellee Public Utilities Commission of the District of Columbia.

Mr. W. V. T. Justis, with whom *Messrs. Edmund L. Jones, F. Gloyd Awalt* and *F. Keith Kelly* were on the brief, for appellee Capital Transit Company.

Before WASHINGTON, DANAHER and BASTIAN, Circuit Judges.

WASHINGTON, *Circuit Judge*: This is an appeal by a transit rider from a judgment of the District Court affirming an order dated January 20, 1954, of the Public Utilities Commission of the District of Columbia, which granted a rate increase to the Capital Transit Company. The opinion of the District Court (Judge Keech) sets

forth the facts in some detail. *Allied Civic Group, Inc.* v. *Public Utilities Commission*, 125 F.Supp. 453 (1954).

The appellant relies in this court on two principal contentions, both of which the District Court over-ruled: first, that under the circumstances of this case the Commission cannot properly use a rate base resting on the original cost of the Transit Company's properties, and, second, that the Public Utilities Commission has jurisdiction, which it failed to exercise, to regulate fares for Transit's operations between points within the District of Columbia and points within Maryland. These two contentions are dealt with in Parts 10 and 12 of the opinion of the District Court. 125 F.Supp. 460, 461. In reference to the second point mentioned, we are satisfied that there is no error.

The importance of the first question presented needs no underscoring. The choice of a proper rate base is, of course, vital to the setting up of a sound and workable fare structure. In that regard the Commission's opinion has this to say:

> "*RATE BASE*
>
> "The Commission has in the past consistently stated, as the rate base, the amount reflecting the historical cost of property used and useful in the Company's transit operations in the District of Columbia, stated at the cost to the owner first devoting the properties to public use, less accumulated depreciation per books—plus a single working capital allowance in respect of the cost of materials and supplies. See *in re Capital Transit Company*, Formal Case No. 417, decided August 21, 1952; *id.*, Formal Case No. 413, decided January 4, 1952; *id.*, Formal Case No. 396, decided June 28, 1950.
>
> "For the purposes of the present proceedings, the Commission staff has developed on this method the amount of $23,420,691, representing the weighted investment in rate base property for the Future Annual Period, adjusted *inter alia* in respect of depreciation

in accordance with the stipulation in Formal Case No. 427 mentioned above, and allocated on a 93+% basis to the District of Columbia. (Commission Exhibit 38, Schedule 3.) The Company, which had contended for certain higher amounts representing rate base in their exhibits and testimony, has accepted the figure thus developed by the Commission staff. (Company Brief, p. 4.)

"For the purposes of this proceeding, we find and conclude that $23,420,691 is the Company's rate base on which a return is allowable.

"Although an 'original cost' basis for rate making is thus continued for the purposes of the present case, it is to be observed that the real value in the market place of the Company's operating properties have been seriously affected by the steady and rapid decline in passenger riding sustained, over a long period of time, except for a brief period during World War II. Economically, the transit industry and the Company are contracting, capital-wise, rather than stable or expanding operations.

"This fact was reflected in the sale, on September 12, 1949, from the North American Company to S. E. Wolfson and Associates (hereafter called the 'Wolfson Group') of 45.61% of the Company's stock, carrying effective control of the Company, for $20 per share. On this basis, the then value of 100% of the stock was $4,800,000. Under somewhat similar circumstances, when 100% of the property of a transit company was sold for $7,500,000, the California Commission determined a rate base of $7,950,000 (the price at which the properties had been offered for sale) despite indicated historical costs on the order of $25,000,000 and book value of over $41,000,000 covered by Commission approved securities of over $37,000,000. This rate base was sustained by the Supreme Court, because of the economic plight of the street railway involved. *Market Street R. Co.* v. *Railroad Comm. of Cal.*, 324 U.S. 548, 564-568. As observed by Justices Black, Douglas and Murphy, concurring in the *Nat. Gas Pipeline Co.* case, *supra*, at p. 608, 'The investor and consumer interests may so collide as to warrant the rate making body in concluding that a return on historical cost or prudent

investment, though fair to investors, would be grossly unfair to consumers.'

"We do not suggest that the Company's present situation demands that the determination of rate base on original cost methods be abandoned at this time. We do note that continuation or accentuation of present riding declines may in the future produce a situation—due to economic circumstances rather than Commission action—in which a return within the conventionally 'reasonable' range cannot realistically be estimated on an original cost rate base to be produced from reasonable fares." (Order, pp. 4-5)

In its discussion of "Controlling Principles," which prefaced the passage just quoted, the Commission said:

"In considering the rights of the investors, we properly give weight to the Company's practical situation as a unit of a 'generally sick industry', beset by competition, and with an investment 'already impaired by economic forces.' *Market Street R. Co.* v. *Railroad Comm. of Cal.*, 324 U.S. 548, 554. In this industry, we can and do take account of the practical results of fare increases in respect of the withdrawal of public patronage from the Company; *id.*, 324 U.S. at 563-4.

"In view of rapid current decline in transit riding, discussed later, it is obviously in the long-term interest of the investors, as well as the interest of transit riders and the community, that fares be kept at the lowest level consonant with the preservation of the Company in private hands, in a healthy operating condition. Thus, the investors would suffer with the public if, as suggested in the record, excessive fares produced a boycott of the use of mass transit. It is clear that the interests of all are fostered by fare structures and Company policies designed to encourage mass riding.

"Second, we have no duty to impose unreasonable transit fares in order simply that stockholders may earn dividends. *Covington & L. Turnp. Road Co.* v. *Sandford*, 164 U.S. 578, 596. We should attempt to set fares sufficient to secure a fair return to the investors 'provided the business is capable of earning

it. But regulation does not insure that the business shall produce net revenues.' *Federal Power Comm.* v. *Nat. Gas Pipeline Co.*, 315 U.S. 575, 586. No more can be exacted from the public than the service is reasonably worth (*Smyth* v. *Ames*, 169 U.S. 466, 547).

"Third, we are not bound to the use of any single formula or combination of formulae in setting rates of fare. Rate making bodies are 'free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances.' *Federal Power Comm.* v. *Nat. Gas Pipeline Co.*, 315 U.S. 575, 586; *Federal Power Comm.* v. *Hope Nat. Gas Co.*, 320 U.S. 591, 602. The 'particular circumstances' of the Company include not only the conventional problems of rate base, expense and rate of return, but in addition include (1) problems general to the transit industry such as 'normal decline' in numbers of passengers and additional decline in passengers attributable to refusal to pay higher fares, (2) special additional problems of the Company, such as the traffic conditions in Washington, with concomitant community interest in mass transit as a partial solution to overcrowded streets, and deterioration of public relations due to public reaction against dividend policies of the present management." (Order, p. 3)

The findings and conclusions we have quoted could well, we think, have supported a conclusion by the Commission that the rate base should be set at a level reflecting the current value of the company's properties, viewed realistically. *Market Street Railway Co.* v. *Railroad Commission*, 324 U.S. 548 (1945). But the Commission did not then adopt such a rate base. Instead of following its quoted findings to what would appear to be their logical conclusion, the Commission reached a different conclusion. As we have seen, it arrived at a rate base in the amount of $23,420,691, representing the company's original property investment, as weighted and adjusted by the Commission. And the Commission's reasons for using the original cost rate base do not clearly appear from its

opinion and order. This gives us our present concern, not because we mean to intimate which base should predicate Commission action, but because we cannot properly exercise our appellate function unless the Commission states the reasons for the course it decided to follow. The fact, of course, that the original cost rate base had been used on previous occasions is not a sufficient reason, without more, for continuing its use. As we said in a somewhat similar context:

> "While under certain circumstances, reliance on a prior proceeding for this purpose might be permissible, such circumstances do not exist in this case. There is nothing before us to indicate that pertinent local conditions and economic conditions generally have remained static during the intervening years." *Washington Gas Light Co.* v. *Baker,* 88 U.S.App.D.C. 115, 121, 188 F.2d 11, 17 (1950), cert. denied, 340 U.S. 952 (1951).

On the larger issue, that of granting increased rates to the Transit Company, the Commission's basic reasons for the grant appear to be evidenced by the following quotations:

> "Within the limitations of general transit economies, we propose to determine fares sufficient to provide the Company with a return adequate, under efficient and economical management, to support the Company's credit and to maintain its financial soundness." (Order, p. 24)

> "Under the circumstances of this case, we are unable to fix a rate of return high enough to restore the economic decline in the market value of the Company's stock which occurred many years ago. We further conclude that a return that is sufficient to protect the financial integrity of the Company, that will permit of the raising of such additional capital as may be needed for the foreseeable future, and will permit of the payment of reasonable dividends to the investors in equity capital, constitutes a fair rate of return, and that a return falling within the range of 6-1/4% to 6-1/2% will meet these requirements.

"Under the fare structure determined upon considerations hereafter detailed, the Company may reasonably anticipate a rate of return of approximately 6.32% on the original cost rate base devoted to rendering service in the District of Columbia, which, under all the circumstances, is fair and reasonable to the Company and to the investors." (Order, p. 26)

"After establishing that it is necessary to raise the present level of fares in order that this Company may have a reasonable prospect of earning a fair return (see page 20), the next problem is to determine the form which the higher schedule of fares should take." (Order, p. 30)

The considerations just indicated may, of course, properly be taken into account by the Commission in reaching its final decision. But they must be balanced against other relevant factors. They cannot be regarded, standing alone, as justification for adopting the original cost rate base as contrasted with other possible bases.[1] "The investor and consumer interests may so collide as to warrant the rate-making body in concluding that a return on historical cost or prudent investment, though fair to investors, would be grossly unfair to the consumers." *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 608 (1942) (concurring opinion; quoted by the Commission in its order here under review at p. 4)

We are not here expressing a judgment as to what rate base the Commission should have adopted. That is not our function; we could not substitute our own view on such a question—if we had reached a view—for that of the Commission. *Federal Power Commission* v. *Colorado*

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[1] The same may be said of the Commission's findings—made in connection with its examination of the investors' situation rather than its study of the rate base problem—that "the Company is in an excellent condition financially, as compared to the transit industry generally" (Order, p. 7), and that the market price of its stock in 1953 was about three times what it was in 1949 (Order, p. 5).

Interstate Gas Co., 348 U.S. 492 (1955). Nor are we saying that the Commission may not ultimately be able to justify its adoption of the original cost rate base, if it decides to adhere to that course. But we do say that the decision of the Commission must be based on a "suitably complete statement" of its reasons for its conclusions. *Florida* v. *United States*, 282 U.S. 194, 215 (1931), citing *Beaumont, S.L. & W. Ry.* v. *United States*, 282 U.S. 74, 86 (1930). And see *Capital Transit Co.* v. *Public Utilities Commission*, 93 U.S.App.D.C. 194, 205, 213 F.2d 176, 186-87 (separate opinion of Chief Judge Stephens), cert. denied, 348 U.S. 816.

Concluding, as we do, that the report and order of the Commission do not reflect an adequate statement of its reasons for adopting the original cost rate base, we must reverse the judgment of the District Court, with directions to remand the case to the Commission for such further action on its part as may be consistent with this opinion. Pending such further action, which should be taken without unreasonable delay, the District Court may permit the Commission's order to remain in effect. Any new finding or order issued by the Commission will be subject to judicial review in the ordinary course. Under the circumstances, we do not deem it necessary to pass on the remaining contentions of the parties.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1955

No. 12,523

Filed July 8, 1955

GEORGE SPIEGEL, *Appellant*,

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA AND CAPITAL TRANSIT COMPANY, *Appellees*.

APPEAL FROM the United States District Court for the District of Columbia.

Before: Washington, Danaher and Bastian, Circuit Judges.

JUDGMENT

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment—of the said District Court appealed from in this cause be, and the same is hereby, reversed with costs, and that this cause be, and the same is hereby, remanded to the said District Court with directions to remand the case to the Public Utilities Commission of the District of Columbia for such further action on its part as may be consistent with the opinion of this Court.

Dated: July 8, 1955.

Per Circuit JUDGE WASHINGTON

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1955

No. 12,523

(Filed Sept. 9, 1955)

GEORGE SPIEGEL, *Appellant,*

v.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA AND CAPITAL TRANSIT COMPANY, *Appellees.*

Before: Edgerton, Chief Judge, Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher and Bastian, Circuit Judges, in Chambers.

ORDER

Upon consideration of the petition for rehearing in banc filed herein by appellee, Capital Transit Company, it is

ORDERED by the Court that the aforesaid petition be, and it is hereby, denied.

Per Curiam.

Dated: September 9, 1955

Circuit Judges Wilbur K. Miller and Fahy would grant the petition for rehearing in banc.

Circuit Judge Prettyman did not participate in the foregoing order.

APPENDIX D

Passages From Order No. 4052.

Passage A

"On the basis of this massive record and matters of official notice before the Commission, it is our task to establish fares which properly evaluate the interests of the investors and the transit riders, and the community interest in mass transit in Washington . . . " (R. 3.)

Passage B

" . . . In considering the rights of the investors, we properly give weight to the Company's practical situation as a unit of a 'generally sick industry', beset by competition, and with an investment 'already impaired by economic forces.' *Market Street R. Co.* v. *Railroad Comm. of Cal.*, 324 U.S. 548, 554. In this industry, we can and do take account of the practical results of fare increases in respect of the withdrawal of public patronage from the Company; *id.*, 324 U.S. at 563-4.

"In view of rapid current decline in transit riding, discussed later, it is obviously in the long-term interest of the investors, as well as the interest of transit riders and the community, that fares be kept at the lowest level consonant with the preservation of the Company in private hands, in a healthy operating condition. Thus, the investors would suffer with the public if, as suggested in the record, excessive fares produced a boycott of the use of mass transit. It is clear that the interests of all are fostered by fare structures and Company policies designed to encourage mass riding.

" . . . [W]e have no duty to impose unreasonable transit fares in order simply that stockholders may earn dividends. *Covington & L. Turnp. Road Co.* v. *Sandford*, 164 U.S. 578, 596. We should attempt to set fares sufficient to secure a fair return to the investors 'provided the business is capable of earning it. But regulation does not insure that the business shall produce net revenues.' *Federal Power Comm.* v. *Nat. Gas Pipeline Co.*, 315 U.S. 575, 586. No more can be exacted from the public than the service is reasonably worth (*Smyth* v. *Ames*, 169 U.S. 466, 547).

" . . . [W]e are not bound to the use of any single formula or combination of formulae in setting rates of fare. Rate making bodies are 'free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances.' *Federal Power Comm.* v. *Nat. Gas Pipeline Co.*, 315 U.S. 575, 586; *Federal Power Comm.* v. *Hope Nat. Gas Co.*, 320 U.S. 591, 602. The 'particular circumstances' of the Company include not only the conventional problems of rate base, expense and rate of return, but in addition include (1) problems general to the transit industry such as 'normal decline' in numbers of passengers and additional decline in passengers attributable to refusal to pay higher fares, (2) special additional problems of the Company, such as the traffic conditions in Washington, with concomitant community interest in mass transit as a partial solution to overcrowded streets, and deterioration of public relations due to public reaction against dividend policies of the present management." (R. 4.)

Passage C

"The Commission has in the past consistently stated, as the rate base, the amount reflecting the historical cost of property used and useful in the Company's transit operations in the District of Columbia, stated at the cost to the owner first devoting the properties to public use, less accumulated depreciation per books—plus a single working capital allowance in respect of the cost of materials and supplies. See *in re Capital Transit Company*, Formal Case No. 417, decided August 21, 1952; *id.*, Formal Case No. 413, decided January 4, 1952; *id.*, Formal Case No. 396, decided June 28, 1950.

"For the purposes of the present proceedings, the Commission staff has developed on this method the amount of $23,420,691, representing the weighted investment in rate base property for the Future Annual Period, adjusted *inter alia* in respect of depreciation in accordance with the stipulation in Formal Case No. 427 mentioned above, and allocated on a 93+% basis to the District of Columbia. (Commission Exhibit 38, Schedule 3.) The Company, which had contended for certain higher amounts representing rate base in their exhibits and testimony, has accepted the figure thus developed by the Commission staff. (Company Brief, p. 4.)

"For the purposes of this proceeding, we find and conclude that $23,420,691 is the Company's rate base on which a return is allowable." (R. 5.)

Passage D

"Although an 'original cost' basis for rate making is thus continued for the purposes of the present case, it is to be observed that the real value in the market place of the Company's operating properties have been seriously affected by the steady and rapid decline in passenger riding sustained, over a long period of time, except for a brief period during World War II. Economically, the transit industry and the Company are contracting, capitalwise, rather than stable or expanding operations.

"This fact was reflected in the sale, on September 12, 1949, from the North American Company to S. E. Wolfson and Associates (hereafter called the 'Wolfson Group') of 45.61% of the Company's stock, carrying effective control of the Company, for $20 per share. On this basis, the then value of 100% of the stock was $4,800,000. Under somewhat similar circumstances when 100% of the property of a transit company was sold for $7,500,000, the California Commission determined a rate base of $7,950,000 (the price at which the properties had been offered for sale) despite indicated historical costs on the order of $25,000,000 and book value of over $41,000,000 covered by Commission approved securities of over $37,000,000. This rate base was sustained by the Supreme Court, because of the economic plight of the street railway involved. *Market Street R. Co.* v. *Railroad Comm. of Cal.*, 324 U.S. 548, 564-568. As observed by Justices Black, Douglas and Murphy, concurring in the *Nat. Gas Pipeline Co.* case, *supra*, at p. 608, 'The investor and consumer interests may so collide as to warrant the rate making body in concluding that a return on historical cost or prudent investment, though fair to investors, would be grossly unfair to consumers.'" (R. 5-6.)

Passage E

"We do not suggest that the Company's present situation demands that the determination of rate base on original cost methods be abandoned at this time. We do note

that continuation or accentuation of present riding declines may in the future produce a situation—due to economic circumstances rather than Commission action—in which a return within the conventionally 'reasonable' range cannot realistically be estimated on an original cost rate base to be produced from reasonable fares." (R. 6.)

Passage F

"Our acceptance of the 'original cost' rate base for purposes of this case does not preclude effective consideration of the economic realities about the Company's stock, with impact on allowable rate of return, ..." (R. 6.)

Passage G

"As of April 30, 1953, and the present, the Company is in an excellent condition financially, as compared to the transit industry generally, despite recent instances of yearly dividend payouts in excess of current earnings. Thus, cash and marketable securities of $7.2 million are included in current assets, while all current liabilities aggregate $3.4 million. During the year ended April 30, 1953, the Company reacquired $1 million of its mortgage bonds, and bought $2 million of busses for cash. Reacquisition of bonds from excess cash has continued during the subsequent period. Investment in road and equipment increased $1.59 million and depreciation reserve increased $1.45 million." (R. 8.)

Passage H

" . . . [P]ractical considerations of the economics of the transit industry locally (as well as nation-wide) preclude the possibility of imposing 'reasonable' fares that will produce the theoretically justified higher returns relative to the gas and electric industries, demanded by the Company . . . " (R. 22.)

Passage I

"As indicated in the foregoing pages, the Company is financially sound and able to operate successfully. Within the limitations of general transit economies, we propose to determine fares sufficient to provide the Company with a return adequate, under efficient and economical manage-

ment, to support the Company's credit and to maintain its financial soundness. The Company has, in the past few years, improved its 'financial integrity' in respect of the ratio of market price to book value of stock . . . " (R. 25.)

Passage J

"2. Under the fare structure determined upon considerations hereafter detailed, the Company may reasonably anticipate a rate of return of approximately 6.32% on the original cost rate base devoted to rendering service in the District of Columbia, which, under all the circumstances, is fair and reasonable to the Company and to the investors. Such a fair rate of return will result in: increased fares that, however, are still not unreasonably high; a return to the equity owners that will be commensurate with the return on investments in other combination rail and bus companies, and will be sufficient to assure confidence in the financial integrity of the enterprise at the levels of recent years (which are very substantially above the levels of all prior years back to the date of organization) so as to maintain its current and recent credit and to attract needed capital; and an allowance, after paying all expenses of operation, setting aside the necessary sums for depreciation and payment of interest of an amount that will provide for reasonable dividends . . . " (R. 27.)

Passage K

"Upon the foregoing considerations, and from all of the evidence in the case, the Commission finds and concludes that the following fare structure is reasonable, just and non-discriminatory, and is in the public interest:

Cash fare—20 cents
Token fare—5 for 80 cents
School fare—3 cents
Weekly Permit—75 cents, plus 10 cents per ride."
(R. 42.)

Office - Supreme Court, U.S.
FILED
OCT 26 1955
HAROLD B. WILLEY, Clerk

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 463

Capital Transit Company, Petitioner

v.

George Spiegel

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

Proceedings Before Commission

There should be noted, in addition to the Statement contained in the petition of Capital Transit Company ("Transit") (pp. 4-6), the following pertinent findings and conclusions.

The Commission found that during the future annual period, test year, that the old fares would produce a net operating income of $986,084 (after taxes, before interest and dividends) or 4.21% on the Commission's net, book, original cost rate base of $23,420,691. The Commission authorized new fares estimated to produce a net operating income of $1,480,630 for a 6.32% rate of return on the same rate base. (R. 21, R. 41.)

However, the Commission set forth findings and conclusions which Respondent contends demonstrate the unreasonableness to the riders of this increased return and increased fares based thereon. These can be summarized as follows.

In weighing the interests of investors, riders, and the public, the Commission concluded that, because of the general passenger declines, which would be accentuated by increased fares, and because of traffic conditions, it was "obviously in the long term interest ... that fares be kept at the lowest level consonant with the preservation of the Company in private hands, in a healthy operating condition." (R. 4.)

The Commission concluded that the "real value in the market place of the Company's operating properties have been seriously affected by the steady and rapid decline in passenger riding sustained over a long period of time...." This "fact was reflected" in the sale of 45.61% of the common stock at $20 per share, on which basis the "then value" of 100% of the stock was $4,800,000. These were "somewhat similar circumstances" to those involved in Market Street Railway Co. v. Railroad Commission of California, 324 U.S. 548, 564-568, where the Supreme Court upheld fares set on a rate base valuation derived from the price at which the Market Street Railway Co. had offered to sell its properties to San Francisco. (R. 5.)

The Commission found that: "No recent rate increase has actually provided the rate of return on original cost fixed by the Commission. Thus by successive orders from 1946 to 1952 the Commission has found that the fares would produce returns of 5-3/4%, 6.4%, 6.73%, and 6-1/2 to 7%; however the adjusted

return has been successively 5.68%, 1.74%, 3.14%, 4.32%, 5.59%, 6.23% and 4.65%." (R. 6.)

The Commission found that average stock price was $26.40 per share during the year following Transit's formation in 1933, that it fluctuated between $8.00 and $34.48 in the period 1933-1949, that it stood at $20.76 during 1949, and that it increased to $60.00 and $58.24 respectively during 1952 and 1953. (R. 6; old stock basis before 4-1 split.) It concluded from this analysis that: "The economic loss to the original investors obviously dates back prior to the formation of the Company, is established by a long history, and is currently less than it has been in the past." (R. 7.)

The Commission found that during the period 1933-1949 dividends had never exceeded $2.00 per share. It further found that "... from 1945 to the Wolfson acquisition, the stockholders realized $7.50 per share. In the comparable period since the acquisition, the stockholders have realized $30.00 per share, or 150% of the amount, $20.00 per share, at which the controlling interest in the company was bought by the Wolfson group in 1949." (R. 7.)

The Commission found that Transit is in "excellent condition financially, as compared to the transit industry generally" despite recent dividends in excess of earnings (R. 8).

The Commission found that Transit "has no apparent need for raising new capital by way of stock issues." (R. 26.)

Appeal to the Court of Appeals

There should be noted, in addition to the Statement contained in Transit's petition (pp. 7-9) the following.

The Court of Appeals quoted from the Natural Gas Pipeline decision, infra, the same language which the Commission had also quoted in its order:

"'The investor and consumer interests may so collide as to warrant the rate-making body in concluding that a return on historical cost or prudent investment, though fair to investors, would be grossly unfair to the consumers.' Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 608 (1942) (concurring opinion; quoted by the Commission in its order here under review at p. 4)." (See Transit pet. p. 7a.)

The cases cited by the Court of Appeals in support of its ruling that the Commission's decision must contain a suitably complete statement of its reasons for its conclusions, included Capital Transit Co. v. Public Utilities Commission of D.C. and Potomac Electric Power Co., 93 U.S.App. D.C. 194, 205, 213 F.2d 176, 186-187 (separate concurring opinion of Chief Judge Stephens), cert. denied, 348 U.S. 816. (See Transit Pet. p. 8a.)

The Court of Appeals order remanding the case concluded:

"Any new finding or order issued by the Commission will be subject to judicial review in the ordinary course. Under the circumstances, we do not deem it necessary to pass on the remaining contentions of the parties." (See Transit Pet. p. 8a.) Respondent's remaining contentions were that, assuming the propriety here of an original cost rate base, the Commission here erred becuase it did not deduct from book rate base the underaccrual of the depreciation reserve, and the advance accrual of income taxes and of injuries and damages. (See Respondent's Opening Brief below, pp. 38-41.)

ARGUMENT

This case is a statutory review of a rate order of the Public Utilities Commission of the District of Columbia and is solely a matter of local concern. This Court has consistently declined review of such cases. Transit argues that the decision below would be a precedent for the review of natural gas rates under the Natural Gas Act; but this is most unlikely in view of the wholly different circumstances of the interstate pipeline and local transit industries. The incongruity of such comparison is illustrated by Transit's attempt to state a conflict with the Hope Natural Gas case, infra, without mentioning the Market Street Railway case, infra, in which this Court held the Hope Natural Gas case of limited application to the declining transit industry. Further, in the Hope case, the Federal Power Commission had stated its reasons for using an original cost rate base and had made specific findings which, in the context of the case, independently suuported the result reached as reasonable to the utility. However, in the instant case, the reasonableness of the fares to the riders can be justified only by the rate-making method used because the independent findings contradict the result reached. Nor is there substance in Transit's contentions as to conflict with this Court's decisions on the adequacy of findings; the Court below never reached that question since its exercise of appellate function was balked at the outset because the Commission's order did not adequately state its reasons for the rate-making method used.

This Court has twice in recent years denied certiorari to review strikingly similar cases in which the Court of Appeals for the District of Columbia Circuit had reversed rate orders of the Public Utilities Commission of the District of Columbia under the same statutory provisions, for lack of sufficient

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findings and rational support. Both cases were brought by rate-payers, and in neither case did the Court of Appeals decide, what petitioner here urges as error, whether the rates established by the Commission were just and reasonable in end result to the rate-payer. Capital Transit Co. v. Public Utilities Commission of D.C. and Potomac Electric Power Co., 93 U.S.App. D.C. 194, 213 F. 2d 176 (1953), cert. denied 348 U.S. 816 (1954). Washington Gas Light Co. v. Baker, 88 U.S.App.D.C. 115, 188 F.2d 11 (1950), cert. denied 340 U.S. 952 (1951).

This case is a matter of concern only to the District and is therefore one in which the decision of the Court of Appeals, after appellate review by the District Court, should be final. The fares are intra-District only. They are set by the District Commission under the provisions of the District of Columbia Code. Practically all of the utility's operations are within the District. Finally, Transit's charter and franchise are repealed by Public Law 389- 84th Congress, 1st Session, approved August 14, 1955, and therefore there is a pressing local concern that the case be resolved shortly.

While the pertinent District Statutes (Sections 43-401, 43-411, see Transit petition, pp. 3-4) provide the "just and reasonable" standard for rate-making, it is fanciful to find in the Court of Appeals decision an important precedent for application to the regulation of rates for interstate gas pipelines. The circumstances are strikingly different between the expanding, prosperous, nation-girding pipelines and the declining, financially ailing, local mass transit companies.

The incongruity of the parallelism is illustrated by the petitioner's attempt to state a conflict between the instant Court of Appeals decision and Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, without mentioning

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Market Street Railway Co. v. Railroad Commission of California, 324 U.S. 548. This omission is impressive since the Market Street case was pivotal to the instant Court of Appeals decision. In the Market Street case, this Court noted the limited applicability of the Hope case to regulation of the declining transit industry.

Further, the instant question is whether the fares were justified as reasonable to the riders, and that involves wholly different considerations from the question of reasonableness to the utility. In the Market Street case this Court said regarding this aspect of the Hope case:

> "All that was held was that a company could not complain if the return which was allowed made it possible for the Company to operate successfully." (324 U.S. at p. 566)

Finally, in the Hope case the Federal Power Commission made specific findings which, independent of the rate-making method disclosed, supported the result reached against attack by the utility. In the instant case all the relevant, specific findings demonstrate both that the method used was without rational basis and that the result reached was unreasonable to the riders.[1]

---

[1] Thus, for example, the Commission's decision to increase net operating income by some $500,000, and rate of return from 4.21% to 6.32%, is contradicted by its findings and conclusions that: (a) fares must be "kept at the lowest level consonant with the preservation of the Company in private hands, in a healthy operating condition" (R. 4.); (b) despite four recent fare increases between 1946 and 1952 predicated on the need for returns in the 6-7% bracket, Transit never achieved a return as high as the 6.32% used in the instant Commission decision, and in fact the average rate of return for those years was just about the 4.21% that would have been produced without a fare increase (R. 6.); and (c) that nevertheless, and despite dividends in excess of earnings, Transit was in "excellent condition financially as compared with the Transit industry generally" (R. 8). Obviously the end result was not "the lowest level consonant with the preservation of the Company in private hands, in a healthy operating condition."

Transit asserts, as the second conflict with decisions of this Court, the adequacy of the Commission's findings. The Court below did not reach this question because it was unable to find the expression of a rational context in which to evaluate findings. Moreover, Transit is unable to identify any specific findings which support the reasonableness of the fares to the riders; instead, it argues that the "substance" of the findings can be discerned from the whole rate-making method employed, and that the sufficiency of the "form" appears in "the structure of the Commission's basic findings." (Transit pet. pp. 15-16.) Thus Transit's roundabout argument simply seeks a review by this Court of the holding by the Court below that the Commission's statement of reasons was inadequate.

The Court below did examine the substance of the rate-making method and the structure of the basic findings, but it could not make headway because it could not grasp the logic of the structure. On one hand, the Commission made extensive findings and conclusions which justified a rate base "set at a level reflecting the current value of the Company's properties viewed realistically. Market Street Railway Co. v. Railroad Commission ..."; while on the other hand, the Commission used an original cost rate base without "an adequate statement of its reasons." (See Transit pet. pp. 5a and 8a.) In this particular rate order, the reasonableness of the fares to the riders can be shown only through the rate-making method. Therefore, the Court below held that "we cannot properly exercise our appellate function unless the Commission states the reasons for the course it decided to follow"; and remanded for lack of a suitably complete statement of its reasons in accordance with Florida v. United States, 282 U.S. 194, and Beaumont S.L. & W. Ry. v. United States, 282 U.S. 74. (See Transit pet. at pp. 6a and 8a.)

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The asserted conflict with the specific findings quoted by Transit from United States v. Pierce Auto Lines, 327 U.S. 515, and from King v. United States, 344 U.S. 254, is non-existent; it is merely an ingenious effort to compare unlikes. Nor does the Court of Appeals' requirement that "the decision of the Commission must be based on a 'suitably complete statement' of its reasons for its conclusions" involve any detailed annotation of the Commission's decision as Transit urges in arguing a conflict with the Supreme Court decisions listed on page 17 of its petition. There can be no conflict with any of the above cases because they involve different issues.

CONCLUSION

For the foregoing reasons it is submitted that this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

/s/

George Spiegel
Attorney, pro se

723 Northampton Drive
Silver Spring, Maryland

Service Acknowledged:

/s/ W. V. T. Justis

Attorney for Capital
Transit Company

October 26, 1955

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1955

Office - Supreme Court, U.S.
FILED
OCT 26 1955
HAROLD B. WILLEY, Clerk

No. 463

Capital Transit Company, Petitioner

v.

George Spiegel

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION TO DISPENSE WITH PRINTING BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent hereby respectfully moves for leave to dispense with the printing of his Brief in Opposition and for leave to file instead the multilithed typewritten Briefs, one copy of which is annexed hereto.

This is a case which affects the interests of all riders of Capital Transit Company within the District. Respondent personally, and the citizens' groups which support him, have borne with difficulty the total expense of carrying a successful appeal through the Court of Appeals. It is, for them, a practical necessity that printing expenses be minimized if the course of the litigation is not to be decisively affected by such expenses. Therefore Respondent seeks the Court's leave to file his Brief in Opposition in the form annexed hereto.

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Ten additional copies of Respondent's Brief in Opposition have been lodged with the Clerk of this Court.

Respectfully submitted,

/s/

George Spiegel
Attorney, pro se

723 Northampton Drive
Silver Spring, Maryland

I acknowledge service
~~and consent to the granting of this motion:~~
but neither oppose or consent to the granting of the motion.

/s/ W. V. T. Justis

Attorney for Capital Transit Company

October 26, 1955

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 463

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

Proceedings Before Commission

There should be noted, in addition to the Statement contained in the petition of Capital Transit Company ("Transit") (pp. 4-6), the following pertinent findings and conclusions.

The Commission found that during the future annual period, test year, that the old fares would produce a net operating income of $986,084 (after taxes, before interest and dividends) or 4.21% on the Commission's net, book, original cost rate base of $23,420,691. The Commission authorized new fares estimated to produce a net operating income of $1,480,630 for a 6.32% rate of return on the same rate base. (R. 21, R. 41.)

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However, the Commission set forth findings and conclusions which Respondent contends demonstrate the unreasonableness to the riders of this increased return and increased fares based thereon. These can be summarized as follows.

In weighing the interests of investors, riders, and the public, the Commission concluded that, because of the general passenger declines, which would be accentuated by increased fares, and because of traffic conditions, it was "obviously in the long term interest ... that fares be kept at the lowest level consonant with the preservation of the Company in private hands, in a healthy operating condition." (R. 4.)

The Commission concluded that the "real value in the market place of the Company's operating properties have been seriously affected by the steady and rapid decline in passenger riding sustained over a long period of time...." This "fact was reflected" in the sale of 45.61% of the common stock at $20 per share, on which basis the "then value" of 100% of the stock was $4,800,000. These were "somewhat similar circumstances" to those involved in Market Street Railway Co. v. Railroad Commission of California, 324 U.S. 548, 564-568, where the Supreme Court upheld fares set on a rate base valuation derived from the price at which the Market Street Railway Co. had offered to sell its properties to San Francisco. (R. 5.)

The Commission found that: "No recent rate increase has actually provided the rate of return on original cost fixed by the Commission. Thus by successive orders from 1946 to 1952 the Commission has found that the fares would produce returns of 5-3/4%, 6.4%, 6.73%, and 6-1/2 to 7%; however the adjusted

return has been successively 5.68%, 1.74%, 3.14%, 4.32%, 5.59%, 6.23% and 4.65%." (R. 6.)

The Commission found that average stock price was $26.40 per share during the year following Transit's formation in 1933, that it fluctuated between $8.00 and $34.48 in the period 1933-1949, that it stood at $20.76 during 1949, and that it increased to $60.00 and $58.24 respectively during 1952 and 1953. (R. 6; old stock basis before 4-1 split.) It concluded from this analysis that: "The economic loss to the original investors obviously dates back prior to the formation of the Company, is established by a long history, and is currently less than it has been in the past." (R. 7.)

The Commission found that during the period 1933-1949 dividends had never exceeded $2.00 per share. It further found that "... from 1945 to the Wolfson acquisition, the stockholders realized $7.50 per share. In the comparable period since the acquisition, the stockholders have realized $30.00 per share, or 150% of the amount, $20.00 per share, at which the controlling interest in the company was bought by the Wolfson group in 1949." (R. 7.)

The Commission found that Transit is in "excellent condition financially, as compared to the transit industry generally" despite recent dividends in excess of earnings (R. 8).

The Commission found that Transit "has no apparent need for raising new capital by way of stock issues." (R. 26.)

Appeal to the Court of Appeals

There should be noted, in addition to the Statement contained in Transit's petition (pp. 7-9) the following.

The Court of Appeals quoted from the Natural Gas Pipeline decision, infra, the same language which the Commission had also quoted in its order:

"'The investor and consumer interests may so collide as to warrant the rate-making body in concluding that a return on historical cost or prudent investment, though fair to investors, would be grossly unfair to the consumers.' Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 608 (1942) (concurring opinion; quoted by the Commission in its order here under review at p. 4)." (See Transit pet. p. 7a.)

The cases cited by the Court of Appeals in support of its ruling that the Commission's decision must contain a suitably complete statement of its reasons for its conclusions, included Capital Transit Co. v. Public Utilities Commission of D.C. and Potomac Electric Power Co., 93 U.S.App. D.C. 194, 205, 213 F.2d 176, 186-187 (separate concurring opinion of Chief Judge Stephens), cert. denied, 348 U.S. 816. (See Transit Pet. p. 8a.)

The Court of Appeals order remanding the case concluded:

"Any new finding or order issued by the Commission will be subject to judicial review in the ordinary course. Under the circumstances, we do not deem it necessary to pass on the remaining contentions of the parties." (See Transit Pet. p. 8a.) Respondent's remaining contentions were that, assuming the propriety here of an original cost rate base, the Commission here erred becuase it did not deduct from book rate base the underaccrual of the depreciation reserve, and the advance accrual of income taxes and of injuries and damages. (See Respondent's Opening Brief below, pp. 38-41.)

ARGUMENT

This case is a statutory review of a rate order of the Public Utilities Commission of the District of Columbia and is solely a matter of local concern. This Court has consistently declined review of such cases. Transit argues that the decision below would be a precedent for the review of natural gas rates under the Natural Gas Act; but this is most unlikely in view of the wholly different circumstances of the interstate pipeline and local transit industries. The incongruity of such comparison is illustrated by Transit's attempt to state a conflict with the Hope Natural Gas case, infra, without mentioning the Market Street Railway case, infra, in which this Court held the Hope Natural Gas case of limited application to the declining transit industry. Further, in the Hope case, the Federal Power Commission had stated its reasons for using an original cost rate base and had made specific findings which, in the context of the case, independently suuported the result reached as reasonable to the utility. However, in the instant case, the reasonableness of the fares to the riders can be justified only by the rate-making method used because the independent findings contradict the result reached. Nor is there substance in Transit's contentions as to conflict with this Court's decisions on the adequacy of findings; the Court below never reached that question since its exercise of appellate function was balked at the outset because the Commission's order did not adequately state its reasons for the rate-making method used.

This Court has twice in recent years denied certiorari to review strikingly similar cases in which the Court of Appeals for the District of Columbia Circuit had reversed rate orders of the Public Utilities Commission of the District of Columbia under the same statutory provisions, for lack of sufficient

findings and rational support. Both cases were brought by rate-payers, and in neither case did the Court of Appeals decide, what petitioner here urges as error, whether the rates established by the Commission were just and reasonable in end result to the rate-payer. Capital Transit Co. v. Public Utilities Commission of D.C. and Potomac Electric Power Co., 93 U.S.App. D.C. 194, 213 F. 2d 176 (1953), cert. denied 348 U.S. 816 (1954). Washington Gas Light Co. v. Baker, 88 U.S.App.D.C. 115, 188 F.2d 11 (1950), cert. denied 340 U.S. 952 (1951).

This case is a matter of concern only to the District and is therefore one in which the decision of the Court of Appeals, after appellate review by the District Court, should be final. The fares are intra-District only. They are set by the District Commission under the provisions of the District of Columbia Code. Practically all of the utility's operations are within the District. Finally, Transit's charter and franchise are repealed by Public Law 389- 84th Congress, 1st Session, approved August 14, 1955, and therefore there is a pressing local concern that the case be resolved shortly.

While the pertinent District Statutes (Sections 43-401, 43-411, see Transit petition, pp. 3-4) provide the "just and reasonable" standard for rate-making, it is fanciful to find in the Court of Appeals decision an important precedent for application to the regulation of rates for interstate gas pipelines. The circumstances are strikingly different between the expanding, prosperous, nation-girding pipelines and the declining, financially ailing, local mass transit companies.

The incongruity of the parallelism is illustrated by the petitioner's attempt to state a conflict between the instant Court of Appeals decision and Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, without mentioning

Market Street Railway Co. v. Railroad Commission of California, 324 U.S. 548. This omission is impressive since the Market Street case was pivotal to the instant Court of Appeals decision. In the Market Street case, this Court noted the limited applicability of the Hope case to regulation of the declining transit industry.

Further, the instant question is whether the fares were justified as reasonable to the riders, and that involves wholly different considerations from the question of reasonableness to the utility. In the Market Street case this Court said regarding this aspect of the Hope case:

> "All that was held was that a company could not complain if the return which was allowed made it possible for the Company to operate successfully." (324 U.S. at p. 566)

Finally, in the Hope case the Federal Power Commission made specific findings which, independent of the rate-making method disclosed, supported the result reached against attack by the utility. In the instant case all the relevant, specific findings demonstrate both that the method used was without rational basis and that the result reached was unreasonable to the riders.[1]

---

[1] Thus, for example, the Commission's decision to increase net operating income by some $500,000, and rate of return from 4.21% to 6.32%, is contradicted by its findings and conclusions that: (a) fares must be "kept at the lowest level consonant with the preservation of the Company in private hands, in a healthy operating condition" (R. 4.); (b) despite four recent fare increases between 1946 and 1952 predicated on the need for returns in the 6-7% bracket, Transit never achieved a return as high as the 6.32% used in the instant Commission decision, and in fact the average rate of return for those years was just about the 4.21% that would have been produced without a fare increase (R. 6.); and (c) that nevertheless, and despite dividends in excess of earnings, Transit was in "excellent condition financially as compared with the Transit industry generally" (R. 8). Obviously the end result was not "the lowest level consonant with the preservation of the Company in private hands, in a healthy operating condition."

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